Andy bin Bagindah v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO S–05–50 OF 1998
SHAIK DAUD, SITI NORMA YAAKOB AND DENIS ONG JJCA
15 MAY 2000

Criminal Law *— Dangerous Drugs — Statutory presumption — Whether court should separately consider whether statutory presumption is rebutted — Dangerous Drugs Act 1952 s 37(d) & (da)*

Criminal Law *— Dangerous Drugs — Trafficking in dangerous drugs — Defence of no knowledge — Whether court should separately consider whether statutory presumption under s 37(d) & (da) is rebutted — Dangerous Drugs Act 1952 s 39B(1)(a)*

The appellant was convicted under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in dangerous drugs of 811g of cannabis and sentenced to death. The arguments in the appeal centred on three grounds: (i) the trial judge did not separately consider whether the statutory presumptions of trafficking under s 37(da) of the Act was rebutted even if the statutory presumption in s 37(d) was rebutted as required by the Supreme Court case of *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169; (ii) the contradictions in the evidence given by two prosecution witnesses; and (iii) the tendering of a green plastic bag as an exhibit when no such green plastic bag was mentioned by the chemist in his evidence.

Held, dismissing the appeal:

(1) The grounds of judgment of the trial judge clearly showed that the principle in *Mohamad Radhi*'s case was applied to the present case. *Mohamad Radhi*'s case could be distinguished as the qualifying factor was that, 'unless the evidence in a particular case does not obviously so warrant ...'. In *Mohamad Radhi*'s case, the defence was that the accused was in possession of the bag in which the offending drug was found but that he was an innocent and a momentary carrier and called several witnesses in support of that defence whereas, in the present case, the appellant's defence was a mere denial and nothing more (see p 647A–C); *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169 distinguished.

(2) When it came to the assessment of the credibility of the witnesses, the appellate court should not interfere with the findings of the trial judge as the trial judge was a better person to assess such findings. On the facts, the question to be decided by the trial judge was whether the contradictions and/or discrepancies were material ones so as to strike at the very root of the charge. In the present case, the learned judge concluded that there were discrepancies but those discrepancies were not material ones (see p 647F–H).

A (3) On the issue of the green plastic bag, the learned judge rightly held that there was no necessity to call every person who had handled an exhibit as it would suffice if those who were called showed that there was no break in the chain of evidence pertaining to the exhibits. In any case, counsel for the appellant conceded that in spite of the fact that no mention was made of a green plastic bag, there was no evidence of any tampering of the exhibits (see pp 647H–648A).

[Bahasa Malaysia summary

C Perayu telah disabitkan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') untuk mengedar dadah berbahaya sebanyak 811g kanabis dan dikenakan hukuman mati. Hujahan-hujahan di dalam rayuan adalah berlandaskan tiga alasan: (i) hakim perbicaraan tidak mempertimbangkan secara berasingan sama ada anggapan statutori mengedar di bawah s 37(da) Akta tersebut telah dipatahkan D walaupun anggapan statutori di dalam s 37(d) telah dipatahkan seperti yang diperlukan oleh kes Mahkamah Agung dalam *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169; (ii) percanggahan-percanggahan di dalam keterangan yang diberikan oleh dua saksi pihak pendakwaan; dan (iii) pengemukaan suatu beg plastik hijau E sebagai ekshibit walaupun tiada beg hijau sedemikian telah dinyatakan oleh ahli kimia di dalam keterangannya.

Diputuskan, menolak rayuan tersebut:

F (1) Alasan-alasan penghakiman hakim perbicaraan jelas menunjukkan prinsip di dalam kes *Mohamad Radhi* adalah terpakai kepada kes ini. Kes *Mohamad Radhi* boleh dibezakan sebagai faktor bersyarat iaitu bahawa 'kecuali keterangan di dalam kes tertentu tidak secara jelas memerlukan ...'. Di dalam kes *Mohamad Radhi*, pembelaan adalah bahawa tertuduh memiliki sebuah beg di mana dadah tersebut telah ditemui tetapi beliau G adalah tidak bersalah dan hanyalah merupakan pembawa sementara dan tertuduh dalam kes itu juga memanggil beberapa orang saksi-saksi untuk menyokong pembelaan tersebut sementara, di dalam kes ini, pembelaan perayu adalah hanya penafian semata-mata dan tidak lebih daripada itu (lihat ms 647A–C); *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169 H dibeza.

(2) Apabila masa tiba untuk penilaian kebolehpercayaan saksi-saksi, mahkamah rayuan tidak sepatutnya menganggu penemuan hakim perbicaraan kerana hakim perbicaraan adalah orang yang lebih sesuai untuk menilai penemuan sedemikian. Di atas fakta-fakta, I persoalan yang perlu diputuskan oleh hakim perbicaraan adalah sama ada percanggahan-percanggahan dan/atau kesilapan adalah material sehingga mengugat asas pertuduhan tersebut. Di dalam

kes ini, hakim yang arif menyimpulkan bahawa terdapat percanggahan tetapi percanggahan adalah tidak material (lihat ms 647F–H).

(3) Di atas isu beg plastik hijau tersebut, hakim yang arif dengan betul memutuskan bahawa tidak terdapat keperluan untuk memanggil setiap orang yang mengendalikan sesuatu ekshibit kerana ia adalah mencukupi jika mereka yang dipanggil menunjukkan bahawa tiada pemecahan di dalam rantaian keterangan berkenaan dengan ekshibit-ekshibit. Walau apa sekalipun, peguam untuk perayu bersetuju bahawa walaupun tiada apa-apa disebutkan mengenai beg plastik hijau, namun tiada terdapat sebarang keterangan berkenaan pengubahan (tampering) ekshibit-ekshibit tersebut (lihat ms 647H–648A).]

Notes

For cases on s 37(d) and (da) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 49–52.

For cases on s 39B(1)(a) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 117–167.

Cases referred to

Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169 (distd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(d), (da), 39B(1)(a)

Appeal from: Criminal Trial No K47–01 of 1997 (High Court, Kota Kinabalu)

VK Liew (*VK Liew & Co*) for the appellant.
K Muniandy (Deputy Public Prosecutor) for the respondent.

Shaik Daud JCA (delivering judgment of the court): The appellant was convicted under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') in the High Court at Kota Kinabalu on 22 June 1998, for trafficking in dangerous drugs ie 811g of cannabis. The offence was alleged to have been committed on 31 December 1996 at about 3.15 pm at the back of Kedai Nam Soon, Pekan Lama Kudat. He was accordingly sentenced to death. He now appeals against the conviction, and sentence.

Several grounds of appeal were put forward but the learned counsel for the appellant centred his argument on three grounds. Firstly, it is his contention that the learned judge failed to carry out a separate exercise under s 37(da) of the Act as required by the Supreme Court case of *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169. In the Supreme Court case, which is also a drug trafficking case, the court held that unless the evidence in a particular case does not obviously so warrant, it is incumbent upon the court to consider whether on a balance of probability the defence

A has rebutted the statutory presumptions of trafficking under s 37(da) of the Act as a separate exercise even though the court is satisfied on balance that the presumption of possession under s 37(d) of the Act had not been rebutted. On our perusal of the grounds of judgment of the learned judge, we found that he quoted in extenso the findings of the Supreme Court in the *Mohamad Radhi*'s case and applied the principle therein to the present B case. Be that as it may, there is a distinction between that case and the present case. In the present case, the appellant's defence was a mere denial and nothing more. In *Mohamad Radhi*'s case the qualifying factor was that, 'unless the evidence in a particular case does not obviously so warrant ...'. The defence was not a mere denial but that he was in possession of the bag C in which the offending drug was found but that he was an innocent and a momentary carrier and called several witnesses in support of that defence. The trial judge simply brushed aside all these and held that since the accused had failed to rebut the presumption of possession under s 37(d) of the Act, the presumption under s 37(da) of the Act had also not been rebutted. As can be seen in the light of the defence therein, the trial judge D failed to carry out a separate exercise to consider whether the defence had also rebutted the presumption of trafficking.

In the present case, the appellant had denied possession and the learned judge found that after considering the whole evidence, including that of the appellant, he was satisfied that the prosecution had proved their case E beyond a reasonable doubt and the appellant had failed to raise any doubt, we find no reason to disagree with the learned judge. Therefore, the circumstances in the present case did not warrant the learned judge to undertake a separate exercise.

The second ground raised by the appellant was that there were contradictions between two prosecution witnesses namely PW2, Inspector F Abdul Rozak bin Muhammad, the leader of the ambush team, and that of PW5, DSP Mohd Deraman, the Ketua Polis Daerah Kudat.

There is no dearth of authorities to say that in every case, there are bound to be contradictions and discrepancies. The question to be decided by the trial judge is whether those contradictions and/or discrepancies are G material ones so as to strike at the very root of the charge. It is for the trial judge to consider this since he was the one who saw and heard the evidence. In the present case the learned judge concluded that there were discrepancies but those discrepancies were not material ones. Since this involved the credibility of witnesses, we held that the learned judge was a better person to decide and an appellate court ought not to interfere with H such findings.

The third and final ground raised by the appellant was the tender of a green plastic bag in the court as an exhibit when no such green plastic bag was ever mentioned by the chemist when he gave evidence. On this the learned judge rightly held that, there was no necessity to call as witnesses I every person who had handled an exhibit. Suffice if those called show that there is no break in the chain of evidence pertaining to the exhibits. We found this to be the right proposition for the learned judge to arrive at. In

any case, learned counsel for the appellant before us conceded that in spite of this there was no evidence of any tampering of the exhibits. Therefore, we found no merit on this ground.

On our scrutiny of the evidence, we found that there were ample evidence before the learned judge for him to convict the appellant on the charge of trafficking in the 811g of cannabis and we saw no reason to interfere, especially when the majority of the findings were findings of fact.

We accordingly dismissed the appeal and confirmed the conviction and the sentence imposed.

Appeal dismissed.

Reported by Chin En Tek